STATE OF MICHIGAN

COURT OF APPEALS

UNIVERSAL CONEY ISLAND,

Plaintiff-Appellant,

v

SARMAD KAJU, HADIL KAJU, KINGS LIQUOR STORE, JUAN ALVARDO DIAZ, and TAQUERIA LA GUADALUPANA,

Defendants-Appellees.

UNPUBLISHED
April 19, 2007

No. 267076
Oakland Circuit Court
LC No. 2003-052303-CB

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In this trespass action, plaintiff appeals as of right from the trial court's amended opinion and order, following a bench trial, partially granting plaintiff's request for injunctive relief and requiring defendants to pay future damages of $200 a month for the use of plaintiff's property. We affirm in part, reverse in part, and remand for further proceedings.

I

This case involves the unauthorized use of a parking lot owned by plaintiff, Universal Coney Island.[1] The parking lot is in a shopping center in the city of Pontiac that is divided into two parcels ("Parcel 1" and "Parcel 2"), that share a single building extending across both parcels. The remainder of the parcels is largely a parking lot, with ingress and egress available from Perry Street to the north and from Martin Luther King Boulevard to the east. There is no vehicle access from Perry Street to Parcel 2 without crossing Parcel 1, but an easement agreement executed by a former owner of both parcels in 1975 granted Parcel 2 a perpetual non-exclusive easement to use the paved surface of Parcel 1 for ingress and egress, with the exception of the parking spaces thereon. In 1996, the Kaju defendants[2] acquired Parcel 2. By

[1] The record indicates that the actual owner is Kole Sylaj, who did business as the Universal Coney Island.

[2] For purposes of this opinion, we will refer to defendants Sarmad Kaju, Hadil Kaju, and Kings Liquor Store collectively as the "Kaju defendants."

early 2000, the Kaju defendants acquired a building located adjacent to Parcel 1 near Perry Street that did not have its own parking area. In October 2000, plaintiff acquired Parcel 1. In 2001, the Kaju defendants leased the building adjacent to Parcel 1 near Perry Street to the Taqueria defendants.[3] After a period of remodeling, the Taqueria restaurant opened for business, notwithstanding notice provided by plaintiff that the restaurant could not use Parcel 1.

In September 2003, plaintiff filed the instant action against the Taqueria defendants and the Kaju defendants, seeking injunctive relief and damages arising from the Taqueria defendants' unauthorized use of Parcel 1 for the Taqueria restaurant. The trial court granted partial summary disposition in favor of plaintiff after finding no genuine issue of material fact with respect to plaintiff's trespass claim. The court also entered a partial judgment for damages of $40,000 against the Kaju defendants based on a case evaluation.

The trial court then conducted a bench trial to determine whether it should order injunctive relief and, because the Taqueria defendants did not accept the case evaluation, to determine the Taqueria defendants' liability for damages at trial. By the time of the trial, the city of Pontiac's planning commission had conditionally approved a revised site plan for the Taqueria restaurant that would allow its customers to park on Parcel 2. But it was still necessary that Parcel 1 be used for ingress and egress to reach Parcel 2. Although finding that the Taqueria restaurant and its employees and customers should be enjoined from using Parcel 1 for parking, the trial court allowed Parcel 1 to be used for ingress and egress purposes. The court ordered defendants to pay plaintiff $200 a month for the wear and tear to Parcel 1, but denied plaintiff's request for past damages against the Taqueria defendants.

II

On appeal, plaintiff argues that the trial court erred by refusing to enjoin the continuing trespass of Parcel 1 for the benefit of the Taqueria restaurant or any other business that might use the building occupied by the Taqueria restaurant. Plaintiff contends that an injunction is mandated by MCL 600.2919(3) or, alternatively, equitable principles. It is unnecessary for us to address plaintiff's statutory argument because we agree that the trial court erred in refusing to order an injunction to prohibit the ingress and egress use of Parcel 1 for the benefit of the Taqueria restaurant under equitable principles.[4]

In general, we review a trial court's findings of fact for clear error. MCR 2.613(C); *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). But if a

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[3] For purposes of this opinion, we will refer to Taqueria La Guadalupana, the restaurant that occupied the building, and defendant Juan Alvardo Diaz, an owner of the restaurant, individually as the "Taqueria restaurant" and "Diaz," respectively, or collectively as the "Taqueria defendants."

[4] Because no party on appeal has urged that this appeal is moot, it is unnecessary to address plaintiff's claim that this appeal is not moot. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) (an appeal is moot when an event has occurred that would make it impossible for this Court to grant relief).

court's factual findings were influenced by an incorrect view of the law, review is not limited to clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Equitable rulings, including a decision whether to grant or deny injunctive relief, are reviewed de novo. *Dyball v Lennox*, 260 Mich App 698, 703; 680 NW2d 522 (2004); see also *Blackhawk Dev Corp, supra* at 40 ("[a] trial court's dispositional ruling on equitable matters . . . is subject to review de novo"). But consideration and weight should be given to the trial court's conclusions in an equity case. *Cantieny v Friebe*, 341 Mich 143, 146; 67 NW2d 102 (1954). Further, a trial court has discretion in granting injunctive relief. See *Holly Twp v Dep't of Natural Resources*, 440 Mich 891; 487 NW2d 753 (1992), and *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 534; 609 NW2d 574 (2000) (reviewing injunctive relief for an abuse of discretion). An abuse of discretion standard acknowledges that circumstances will arise where there will be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

It has long been held that "[i]t is not every case of injury to real estate of a permanent character that equity will enjoin, and the court will look to all the facts and circumstances**,** and grant or withhold relief as the justice or equity of the case may require." *Potter v Saginaw Union Street R*, 83 Mich 285, 298; 47 NW 217 (1890). After reviewing the record, we conclude that the trial court took an appropriate, principled approach when deciding whether an injunction should be ordered by considering the factors in 4 Restatement Torts, 2d, § 936, pp 565-566, as set forth in *Kernen v Homestead Dev Co*, 232 Mich App 503, 514; 591 NW2 369 (1998); see also *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 142-143 n 6; 500 NW2d 115 (1993). But, we conclude that trial court abused its discretion when it refused to order an injunction to preclude ingress or egress to Parcel 1 for the benefit of the Taqueria restaurant. The trial court clearly erred in finding that the nature of the interest to be protected in this case weighs in favor of the Taqueria defendants, and not plaintiff, because the entry to Parcel 1 is open to the public. The Taqueria defendants are not simply members of the public who would otherwise have a right to exit and enter Parcel 1. As a lessee of the Kaju defendants, the Taqueria defendants can acquire no greater rights than the Kaju defendants possessed to use Parcel 1. *Adams Outdoor Advertising v City of East Lansing (After Remand)*, 463 Mich 17, 24; 614 NW2d 634 (2000).

"A lease is a conveyance by the owner of an estate of a portion of the interest therein to another for a term less than his own for a valuable consideration." *De Bruyn Produce Co v Romero*, 202 Mich App 92, 98; 508 NW2d 150 (1993). Therefore, for purposes of considering the Taqueria defendants' right to use Parcel 1, the Taqueria defendants stand in the Kaju defendants' shoes for the duration of the lease. The interest to be protected in this case favors plaintiff because the ingress and egress use of Parcel 1 to benefit the Taqueria restaurant housed on the leased premises imposes a burden on Parcel 1 that the Kaju defendants have no right to claim under the easement agreement for Parcel 2. An easement holder may not impose a new or different burden on a servient estate. *Blackhawk Dev Corp, supra* at 46-47; *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957).

Further, the equities favor plaintiff because the circumstances of this case involve a continuous trespass for which damages would be difficult to measure. *Schadewald v Brule*, 225 Mich App 26, 40; 570 NW2d 788 (1997) (injunction proper where circumstances involve a continuing trespass for which damages would be difficult to measure); see also *Stock v Jefferson*

Twp, 114 Mich 357, 360; 72 NW 132 (1897) ("[i]t does not appeal to one's sense of justice to say that the exercise of a right possessed is not of as much benefit to the possessor as the taking of that right from the owner would be to the trespasser, and therefore the trespasser should be allowed to continue his trespass"). And while motives may be considered in determining whether to issue an injunction, the trial court here did not find the type of extortionate "compromise" motive that could cause a court to deny an injunction. *Kratze, supra* at 143-144 n 9. To the contrary, the court found that plaintiff did not engage in misconduct or unreasonably delay bringing this action.

Although granting the injunction would affect the public interest of having a viable business from which the city can collect taxes and create a hardship on the Taqueria defendants and its employees, given the trial court's finding that the injunction would effectively close the Taqueria restaurant by denying access to the only available parking, the responsibility for a hardship weighs heavily in favor of an injunction when it is created by the defendant. See Restatement Torts, 2d, § 941, comment b. Here, the trial court appropriately faulted the Kaju defendants for not appropriately notifying the Taqueria defendants that Parcel 1 could not be used for the leased premises. Because the Taqueria defendants' property rights are derived from the lease with the Kaju defendants, it would be reasonable to expect the Taqueria defendants to turn to the Kaju defendants for any remedy. On balance, requiring plaintiff to provide a remedy for the Kaju defendants' wrong is not equitable.

After considering all the restatement factors in *Kernen, supra* at 514-515, we conclude that the trial court abused its discretion by refusing to order the injunction. The trial court erred by, in effect, creating an easement in gross for the specific benefit of the Taqueria restaurant.[5] The difficulty in enforcing an injunction to prevent ingress and egress to Parcel 1 for the benefit of the Taqueria restaurant, assuming that the Taqueria restaurant would not close if the injunction is ordered, can be addressed by directing the injunction at the activities of the property owner, its lessee, and the lessee's employees, rather than the lessee's customers. Further, a continuing injunction can be modified as warranted by the circumstances. See *Troy v Holcomb*, 362 Mich 163, 169-170; 106 NW2d 762 (1961); *First Protestant Reformed Church v DeWolf*, 358 Mich 489, 495; 100 NW2d 254 (1960). We remand this case to the trial court for modification of its injunctive order to prohibit the owner, the lessee, and the lessee's employees from using, participating in, or promoting the use of Parcel 1 as a means of ingress and egress for the benefit of the property housing the Taqueria restaurant, without plaintiff's consent.

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[5] Unlike a license, which generally grants permission to be on a licensor's land and may be revoked at the pleasure of the licensor, an easement is an interest in land. See *Forge v Smith*, 458 Mich 198, 205-211; 580 NW2d 876 (1998); *Powers v Harlow*, 53 Mich 507, 513; 19 NW 257 (1884). By its very nature, an easement is a right to use the land burdened by the easement for a specific purpose. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378; 699 NW2d 272 (2005). An easement appurtenant is created to benefit another tract of land, while an easement in gross benefits a particular person. *Id.* at 378-379. Allowing a person to take land of another simply because he or she is willing to pay for it amounts to a private eminent domain. *Kratze, supra* at 143 n 9.

III

Because we conclude that the trial court erred in allowing the use of Parcel 1 for ingress and egress, we also vacate its order requiring defendants to pay $200 a month, while using Parcel 1 for ingress and egress, to reimburse plaintiff for wear and tear on Parcel 1. Therefore, it is unnecessary to address plaintiff's claim that the monthly payments were inadequate because they did not reflect the increase in costs through inflation.

We agree with plaintiff that the trial court erred in failing to award any past damages against either of the Taqueria defendants. In general, a plaintiff has the burden of proving damages with reasonable certainty. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). The ultimate goal in a trespass action is to compensate the plaintiff for harm or damage done. *Kratze, supra* at 149. A trial court may use whatever method is most appropriate to compensate a plaintiff for the loss. *Id.* at 149.

Having concluded that reimbursement for the wear and tear to Parcel 1 provided an appropriate method to compensate plaintiff for future damages, we conclude that the trial court erred in failing to apply this method to award past damages caused by the continuous trespass on Parcel 1. It was not necessary that plaintiff prove damages with mathematical precision. *Berrios, supra* at 478. We reject plaintiff's claim that it should have been awarded past damages for benefits or profits conferred on the Taqueria defendants, using a rate of $2 each for an undeterminable number of cars that parked on Parcel 1. Plaintiff's reliance on *Isle Royale Mining Co v Hertin*, 37 Mich 332 (1877), is misplaced because the circumstances of this case do not involve a trespasser attempting to recover damages using the equitable doctrine of title by accession. The payments sought by plaintiff are unnecessary to satisfy the compensatory goal of damages in a trespass action. *Kratze, supra* at 149.

Finally, we conclude that plaintiff failed to preserve its claim for treble damages under MCL 600.2919. To properly preserve a claim for appeal, it must be presented to the trial court. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Although we may overlook preservation requirements to address an issue of law for which the necessary facts have been presented, *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002); *Adam, supra* at 98, given plaintiff's cursory treatment of its claim that the treble damages provision in MCL 600.2919 applies to the type of damage involved in this case, we decline to address this issue. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

In sum, we remand for additional findings and an amended judgment on past damages using the wear-and-tear method for determining damages used by the trial court in its determination of future damages, consistent with MCR 2.611(A)(2)(b) to (d). On remand, the trial court shall render separate findings regarding the liability of Diaz and the Taqueria restaurant for past damages. We express no opinion whether the Taqueria defendants would be entitled to a setoff for the damages that the Kaju defendants are responsible for under the partial judgment previously entered by the court based on the case evaluation. Rather, we have limited our review to plaintiff's challenge to the trial court's denial of past damages against the Taqueria defendants.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey